A

RE CHAI MENG TUT; EX P RHB BANK BHD

HIGH COURT MALAYA, SHAH ALAM
LIM CHONG FONG JC
[BANKRUPTCY CASE NO: 29-1581-02-2013]
13 AUGUST 2014

B

BANKRUPTCY: *Act of bankruptcy – Date of commission – Substituted service of notice – Whether act of bankruptcy committed after seven days of service of bankruptcy notice – Whether subject to r. 276 Bankruptcy Rules 1969 read together with O. 3 r. 2(5) Rules of Court 2012 – Bankruptcy Act 1967, s. 3(1)(i)*

C

BANKRUPTCY: *Act of bankruptcy – Judgment debt – Interest – Whether sum demanded excessive and not in accordance with terms of judgment – Whether interest chargeable on principal sum fixed above base lending rate that was fluctuating – Whether pre judgment interest merged into judgment debt – Whether period from date of judgment and date of filing of bankruptcy notice within limitation period – Whether act of bankruptcy committed – Bankruptcy Act 1967, s. 3(1)(i) – Limitation Act 1953, s. 6(3)*

D

BANKRUPTCY: *Interest – Interest on debts – Banking facilities – Whether excessive sum demanded – Whether interest chargeable on principal sum fixed above base lending rate – Whether pre judgment interest merged into judgment debt – Whether period from date of judgment and date of filing of bankruptcy notice within limitation period – Whether act of bankruptcy committed – Bankruptcy Act 1967, s. 3(1)(i) – Limitation Act 1953, s. 6(3)*

E

BANKRUPTCY: *Notice – Setting aside – Judgment debt – Banking facilities – Whether excessive sum demanded – Whether interest chargeable on principal sum fixed above base lending rate – Whether pre judgment interest merged into judgment debt – Whether period from date of judgment and date of filing of bankruptcy notice within limitation period – Whether act of bankruptcy committed after seven days of service of bankruptcy notice – Whether subject to r. 276 Bankruptcy Rules 1969 read together with O. 3 r. 2(5) Rules of Court 2012 – Bankruptcy Act 1967, s. 3(1)(i) – Limitation Act 1953, s. 6(3)*

F

G

BANKRUPTCY: *Petition – Bankruptcy notice – Setting aside – Whether excessive sum demanded – Whether interest chargeable on principal sum fixed above base lending rate – Whether pre judgment interest merged into judgment debt – Whether period from date of judgment and date of filing of bankruptcy notice within limitation period – Whether act of bankruptcy committed after seven days of service of bankruptcy notice – Bankruptcy Act 1967, s. 3(1)(i) – Bankruptcy Rules 1969, r. 117 – Limitation Act 1953, s. 6(3)*

H

CIVIL PROCEDURE: *Appeal – Consolidation – Setting aside bankruptcy notice and creditor's petition – Appeal against decision of Senior Assistant Registrar – Filing of one consolidated notice of appeal – Whether appeal in breach of O. 56 r. 1(1) and (2) of Rules of Court 2012 – Whether judgment creditor prejudiced*

I

LIMITATION: *Enforcement of judgment – Interest on judgment debt – Issuance of bankruptcy notice and creditor's petition – Whether excessive amount claimed violated s. 6(3) Limitation Act 1953 – Whether pre judgment interest merged into judgment debt – Whether period from date of judgment and date of filing of bankruptcy notice within limitation period*

The judgment creditor obtained a summary judgment dated 14 April 2008 against the judgment debtor. Since there was a default in payment, the judgment creditor commenced bankruptcy proceedings against the judgment debtor. However, before the bankruptcy proceedings could be disposed off, the judgment debtor was adjudged a bankrupt pursuant to another bankruptcy proceedings commenced by CIMB Bank Bhd. Accordingly, the judgment creditor withdrew the bankruptcy proceedings. On appeal, the Court of Appeal set aside the bankruptcy obtained by CIMB Bank Bhd. The judgment creditor therefore commenced fresh bankruptcy proceedings against the judgment debtor. The bankruptcy notice was served on the judgment debtor by substituted service *via* newspaper advertisement dated 31 May 2013. The judgment debtor sent a letter dated 6 June 2013 to the judgment creditor's solicitors claiming that the judgment sum was wrong and excessive. The judgment debtor did not file any application to challenge the bankruptcy notice. Thereafter, the creditor's petition was filed and fixed for hearing before the Senior Assistant Registrar ('SAR'). The judgment debtor opposed this proceeding by filing the judgment debtor's notice of intention to oppose the petition ('the r. 117 notice') made pursuant to r. 117 of the Bankruptcy Rules 1969 and summons in chambers dated 30 September 2013 to set aside the bankruptcy notice and the creditor's petition. In the meantime, the judgment debtor filed an application to set aside the judgment creditor's affidavit which was filed in relation to the r. 117 notice and the summons in chambers. The application was dismissed by the SAR and the judgment debtor's appeal to the judge in chambers was dismissed. On 6 May 2014, the SAR heard the summons in chambers dated 30 September 2013 together with the creditor's petition as opposed by the r. 117 notice. The summons in chambers was dismissed and consequently, the SAR granted the receiving order and adjudication order ('ROAO') against the judgment debtor. Hence, this appeal. A preliminary objection was raised by the judgment creditor that the appeal was irregular since the judgment debtor was primarily appealing against two decisions of the SAR, *ie*, (i) the dismissal of the summons in chambers dated 30 September 2013; and (ii) the creditor's petition where the ROAO was pronounced. As such, it was argued that the appeal was in breach of O. 56 r. 1(1) and (2) of the Rules of Court 2012. On the merits of the appeal, the judgment debtor argued, *inter alia*, that (a) the debt of RM4,602,675.24 as stated in the bankruptcy notice and the creditor's petition was not in accordance with the terms of the summary judgment; (b) there was no act of bankruptcy committed by the judgment debtor; (c) the interest rate

chargeable was at a fixed rate from 24 August 2004 until full realisation as per the terms of the judgment; (d) the date of the act of bankruptcy committed on 11 June 2013 as adopted by the judgment creditor was erroneous since the date should have been 7 June 2011; and (e) the judgment creditor violated s. 6(3) of the Limitation Act 1953 since the interest claimed from 24 August 2004 to 22 February 2013, *ie*, the date of filing the bankruptcy notice was more than six years from the date on which the interest became due.

Held (dismissing appeal with costs):

(1) The grounds in the summons in chambers dated 30 September 2013 and the r. 117 notice were the same save for an additional ground questioning the authority of the signatory of the creditor's petition. Since they had been heard together and having regard to O. 1A of the Rules of Court 2012, particularly where the judgment creditor did not demonstrate any substantive prejudice suffered, the preliminary objection by the judgment creditor was overruled (*Lim Poh Hooi & Yang Lain lwn. William Chiew Soon Ming & Yang Lain*; dist). (paras 29-31)

(2) Commercial banks impose fluctuating base lending rates and the banking facilities afforded by the judgment creditor to the judgment debtor here was likewise on the same footing. On careful examination of the summary judgment, the interest chargeable on the principal sum was fixed at 3.5% above the base lending rate that was fluctuating. The phrase in parenthesis which stated that the base lending rate was 6% as at 23 August 2004 was for information only in relation to the prevailing base lending rate at that point in time. Those could not be construed as limiting words to lock the base lending rate at 6% per annum. (paras 51 & 52)

(3) The judgment creditor claimed for interest on the banking facilities based on the terms of the judgment debt. The pre judgment interest, *ie*, the period between 24 August 2004 to 14 April 2008 (date of the summary judgment) had been merged into the judgment debt. The period from the date of the summary judgment and the date of the filing of the bankruptcy notice was therefore well within the six years period as prescribed by the second limb of s. 6(3) of the Limitation Act 1953 (*Perwira Affin Bank Bhd v. Lim Ah Hee*; refd). (paras 54 & 55)

(4) The sum claimed by the judgment creditor with detailed computation of the interest charged in the bankruptcy notice and the creditor's petition was in accordance with the summary judgment and was not excessive. As such, there was no irregularity in the bankruptcy notice and the creditor's petition. (para 57)

(5) *Vide* s. 3(1)(i) of the Bankruptcy Act 1967, the act of bankruptcy is deemed committed after seven days of the service of the bankruptcy notice if the judgment debtor did not comply with the requirements of the notice. The bankruptcy notice here was served *via* substituted service on 31 May 2013. The seven days period was subject to r. 276 of the Bankruptcy Rules 1969 read together with O. 3 r. 2(5) of the Rules of Court 2012. There were two intervening weekends and the reckoning of time must therefore exclude these four days. As such, the judgment debtor's act of bankruptcy occurred on 11 June 2013. (para 58)

Case(s) referred to:

Affin Bank Bhd v. Tan Sri Kishu Thirathrai (No. 2) [2004] 7 CLJ 145 ***(refd)***
Amat Loyut & Ors v. Ng Eng Kiat & Ors [2014] 1 CLJ 901 HC ***(refd)***
Captain Ho Fooi v. Standard Chartered Bank Malaysia Bhd [2009] 5 CLJ 501 CA ***(refd)***
Datuk Lim Kheng Kim v. Malayan Banking Bhd [1993] 4 BLJ 28 SC ***(refd)***
J Raju M Kerpaya v. Commerce International Merchant Bankers Bhd [2000] 3 CLJ 104 CA ***(refd)***
Jagdis Singh Banta Singh v. Outlet Rank (M) Sdn Bhd [2013] 3 CLJ 47 CA ***(refd)***
Lim Koon Chow v. Ambank (M) Bhd [2012] 4 CLJ 624 HC ***(refd)***
Lim Poh Hooi & Yang Lain lwn. William Chiew Soon Ming & Yang Lain [2007] 10 CLJ 309 HC ***(dist)***
Moscow Narodny Bank Ltd v. Ngan Ching Wen [2004] 2 CLJ 241 FC ***(refd)***
Per: Datuk Dr Kamal Salih; Ex p: Affin Bank Bhd [2008] 1 LNS 80 HC ***(refd)***
Per: EON Bank Bhd; Ex p: Buang Hj Ahmad [2008] 1 LNS 339 HC ***(refd)***
Perwira Affin Bank Bhd v. Lim Ah Hee [2004] 2 CLJ 787 FC ***(refd)***
Re: Dahlia Madon; Ex p: HSBC Bank Malaysia Bhd [2012] 1 LNS 1180 HC ***(refd)***
Re Khaw Siew Suan; Ex p Asia Commercial Finance (M) Bhd [2000] 8 CLJ 516 HC ***(refd)***
Stephen Wong Leong Kiong v. HSBC Bank Malaysia Bhd [2009] 6 CLJ 466 CA ***(refd)***
Tan Chwee Hock v. AmBank (M) Bhd [2012] 8 CLJ 905 CA ***(refd)***
Tan Siew Peng v. MUI Finance Bhd [1996] 1 BLJ 439 HC ***(refd)***
Transbay Ventures Sdn Bhd v. Public Bank Bhd [2007] 7 CLJ 386 HC ***(refd)***
United Malayan Banking Corporation Bhd v. Ernest Cheong Yong Yin [2002] 2 CLJ 413 FC ***(refd)***
Yeoh Kim Leng & Ors v. Kelapa Sawit (Teluk Anson) Sdn Bhd & Ors [2008] 1 LNS 539 HC ***(refd)***

Legislation referred to:

Bankruptcy Act 1967, s. 3(1)(i), (2)(ii)
Bankruptcy Rules 1969, rr. 95, 117, 276
Limitation Act 1953, s. 6(3)
Rules of Court 2012, O. 1A, O. 3 r. 2(5), O. 56 r. 1(1), (2), O. 59 r. 6(1)
Rules of the High Court 1980, O. 14

For the judgment debtor - Jacky Loi; M/s TY Teh & Partners
For the judgment creditor - Karen Tee; M/s Azhar & Goh

Reported by Kumitha Abd Majid

A

JUDGMENT

Lim Chong Fong JC:

Introduction

[1] This is the judgment debtor's appeal in encl. 49 against the decision of the learned Senior Assistant Registrar dated 6 May 2014.

B

[2] The Senior Assistant Registrar dismissed the judgment debtor's notice by debtor of intention to oppose petition dated 26 September 2013 ("Rule 117 Notice") made pursuant to r. 117 of the Bankruptcy Rules 1969 and summons in chambers dated 30 September 2013 and consequently granted the receiving order and adjudication order ("ROAO") against the judgment debtor.

C

[3] This appeal is basically a re-hearing pursuant to O. 56 r. 1 of the Rules of Court 2012; see also *Yeoh Kim Leng & Ors v. Kelapa Sawit (Teluk Anson) Sdn Bhd & Ors* [2008] 1 LNS 539; [2008] 6 AMR 623. I heard the appeal on 8 August 2014.

D

[4] The relevant affidavits filed are as follows:

(i) judgment debtor's supporting affidavit affirmed by Chai Meng Tut on 30 September 2013;

E

(ii) judgment creditor's affidavit in reply affirmed by Thean Soon Hin on 7 November 2013;

(iii) judgment debtor's further affidavit affirmed by Chai Meng Tut on 19 November 2013;

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(iv) judgment creditor's affidavit in reply (no 2) affirmed by Thean Soon Hin on 28 November 2013; and

(v) judgment debtor's further affidavit 2 affirmed by Chai Meng Tut on 9 December 2013.

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Salient Facts

[5] The judgment creditor obtained a summary judgment dated 14 April 2008 pursuant to O. 14 of the Rules of the High Court 1980.

[6] The judgment required the judgment debtor to pay the judgment creditor in the following manner:

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(a) RM 1,064,026.97 due and owing under the Overdraft Facility as at 23.08.2004 together with interest payable thereon at a rate of 3.5% per annum above the Base Lending Rate of the Judgment Creditor (prevailing at 6% per annum as at 23.08.2004) on monthly rest from 24.08.2004 until the full date of full payment;

I

(b) RM 934,547.79 due and owing under the Letter of Credit/Trust Receipt/Banker Acceptance/Shipping Guarantee Facility as at 23.08.2004 together with interest payable thereon at a rate of 3.5% per annum above the Base Lending Rate of the Judgment Creditor (prevailing at 6% per annum as at 23.08.2004) on monthly rest from 24.08.2004 until the full date of full payment; and

(c) costs.

[7] The judgment debtor defaulted in paying the judgment creditor and the judgment creditor accordingly commenced bankruptcy proceedings against the judgment debtor *via* KL High Court Bankruptcy Case No. D-29-3306-2009.

[8] The judgment debtor opposed the bankruptcy proceedings by filing applications to set aside the service of the bankruptcy proceedings as well as to set aside the bankruptcy notice or transfer the proceedings to the Shah Alam High Court.

[9] The Kuala Lumpur High Court transferred the bankruptcy proceedings to the Shah Alam High Court.

[10] Before the Shah Alam High Court disposed of the bankruptcy proceedings, the judgment debtor was adjudged bankrupt on 3 May 2011 pursuant to another bankruptcy proceedings commenced by CIMB Bank Bhd.

[11] Accordingly the judgment creditor withdrew the bankruptcy proceedings that was transferred to the Shah Alam High Court.

[12] The bankruptcy that has procured by CIMB Bank Bhd against the judgment debtor was set aside by the Court of Appeal on 11 December 2012.

[13] The judgment creditor therefore commenced fresh bankruptcy proceedings against the judgment debtor. The bankruptcy notice was issued to the judgment debtor at Lot 51 Jalan Kuda Emas, The Mines Resort City, 43000 Seri Kembangan, Selangor Darul Ehsan and/or 37A Jalan Sungei Besi Indah 1/19, 43000 Seri Kembangan, Selangor Darul Ehsan.

[14] The judgment creditor was unsuccessful in serving the bankruptcy notice on the judgment debtor at the aforesaid addresses.

[15] The bankruptcy notice was subsequently served on the judgment debtor by substituted service as ordered by this court *via* newspaper advertisement dated 31 May 2013.

[16] The judgment debtor then sent a letter dated 6 June 2013 stating that the judgment sum claimed was wrong and excessive. No application was filed by the judgment debtor to challenge the bankruptcy notice.

[17] The judgment creditor accordingly filed the creditor's petition which was fixed for hearing before the Senior Assistant Registrar on 12 October 2013. The creditor's petition was again served by substituted service as order by this court.

[18] The judgment debtor opposed this proceedings by filing the r. 117 Notice dated 26 September 2013 and summons in chambers dated 30 September 2013.

[19] In the meantime, the judgment debtor also filed an application to set aside the judgment creditor's affidavit in reply affirmed by Thean Soon Hin dated 7 November 2013 which was filed in relation to the r. 117 Notice and summons in chambers dated 30 September 2013. This application was dismissed by the Senior Assistant Registrar on 4 December 2014 and the judgment debtor filed an appeal to the judge in chambers.

[20] The judgment debtor also filed an application to stay the hearing of the pending the appeal to the judge in chambers which was allowed by the Senior Assistant Registrar on 24 March 2014.

[21] The learned judge dismissed the judgment debtor's aforesaid appeal on 6 May 2014.

[22] The judgment debtor then on 2 May 2014 filed the application to recuse the Senior Assistant Registrar from hearing the creditor's petition and summons in chambers dated 30 September 2013. The Senior Assistant Registrar dismissed the application and the judgment debtor filed an appeal accordingly.

[23] The Senior Assistant Registrar then on 6 May 2014 heard the summons in chambers dated 30 September 2013 together with the creditor's petition as opposed by the r. 117 Notice. The summons in chambers was dismissed and ROAO was entered against the judgment debtor which now formed the stratum of the appeal before me.

[24] The judgment debtor also on 23 June 2014 filed a further appeal to adduce further evidence pertaining to the conduct of the Senior Assistant Registrar during the hearing on 6 May 2014.

[25] The appeals pertaining to the conduct and recusal of the Senior Assistant Registrar were also fixed before me on 8 August 2014. The judgment debtor decided to withdraw both these appeals which have become unnecessary because the appeal on the summons in chambers dated 30 September 2013 and creditor's petition are by way of re-hearing.

Preliminary Objection

[26] At the hearing of this appeal, Miss Karen Tee counsel for the judgment creditor raised the preliminary objection that the appeal is irregular by reason that the judgment debtor is primarily appealing against

two decisions of the Senior Assistant Registrar *to wit*, firstly the dismissal of the summons in chambers dated 30 September 2013 and secondly the creditor's petition where ROAO was pronounced. In fact two orders of the same date, 6 May 2014 were filed and extracted. The judgment debtor has however only filed one consolidated notice of appeal.

[27] In the premises, Miss Tee argued that the appeal is in breach of the requirements of O. 56 r. 1(1) and (2) of the Rules of Court 2012. She relied on the case of *Lim Poh Hooi & Yang Lain lwn. William Chiew Soon Ming & Yang Lain* [2007] 10 CLJ 309 to justify her argument where Abdul Alim Abdullah JC (as he then was) upheld the preliminary objection.

[28] Mr Jacky Loi, counsel for the judgment debtor in reply argued that as a matter of fact the judgment debtor's contentions in respect of the summons in chambers dated 30 September 2013 and the r. 117 Notice were heard together by the learned Senior Assistant Registrar. He however dismissed the judgment debtor's arguments therein and as a matter of course entered ROAO against the judgment debtor accordingly. Thus the appeal was filed in respect of the arguments that were heard together and as recorded in the order dated 6 May 2014. The other order of the same date is a mere consequential statutory order upon the pronouncement of the ROAO.

[29] I note that the facts in the *Lim Poh Hooi (supra)* case are distinguishable in that the summons in chambers therein were separately filed by two different defendants for security for costs. I have requested from Miss Tee but she is unable to produce any other bankruptcy case authority in point particularly when the applications are intertwined and heard together.

[30] I have reviewed the summons in chambers dated 30 September 2013 to set aside the bankruptcy notice and creditor's petition and the r. 117 Notice and observed that the grounds are the same save for an additional ground questioning the authority of the signatory of the creditor's petition.

[31] Since they have been heard together as submitted by Mr Loi and having regard to O. 1A of the Rules of Court 2012, particularly where the judgment creditor has not demonstrated any substantive prejudice suffered – see *Jagdis Singh Banta Singh v. Outlet Rank (M) Sdn Bhd* [2013] 3 CLJ 47 CA, I overruled the preliminary objection of the judgment creditor as a mere technical failure if the O. 56 r. 1(1) & (2) have not been complied which I do not think so herein.

Judgment Debtor's Contentions

[32] On the merits of the appeal, Mr Loi's contention is primarily reduced to twofold:

(i) the debt of RM4,602,675.24 as stated in the bankruptcy notice and the creditor's petition is not in accordance with the terms of the summary judgment; and

(ii) there was no act of bankruptcy committed by the judgment debtor.

[33] As to the former, it is Mr Loi's argument in gist that the interest rate chargeable is pegged and fixed at 9.5% *to wit*, 3.5% above the base lending rate of 6.5% per annum from 24 August 2004 till full realisation as per the terms of the judgment. In support of his interpretation, Mr Loi relies on the Federal Court case of *United Malayan Banking Corporation Bhd v. Ernest Cheong Yong Yin* [2002] 2 CLJ 413; [2002] 2 MLJ 385 that the interest rate of 9.5 % has been merged into the judgment. Consequently, the computation of the judgment interest which adopted varying rates ranging from 9.05% to 10.3% by the judgment creditor as reflected in the bankruptcy notice and creditor's petition is hence plainly wrong. In addition, Mr Loi argues that the judgment creditor failed to give effect to s. 6(3) of the Limitation Act 1953 that resulted in excessive interest charged and thus following the Court of Appeal case of *Stephen Wong Leong Kiong v. HSBC Bank Malaysia Bhd* [2009] 6 CLJ 466; [2011] 4 MLJ 207, the creditor's petition is defective and of no legal effect. Accordingly, the bankruptcy notice and the creditor's petition is a nullity and must be set aside following the court of appeal cases of *Tan Chwee Hock v. AmBank (M) Bhd* [2012] 8 CLJ 905; [2012] 4 MLJ 159 and *J Raju M Kerpaya v. Commerce International Merchant Bankers Bhd* [2000] 3 CLJ 104; [2000] 3 MLJ 177.

[34] In respect of the latter, Mr Loi submits that by reason of the wrong and excessive sum that was demanded by the judgment creditor in the bankruptcy notice, no act of bankruptcy was committed by the judgment debtor. In addition the date of the act of bankruptcy committed on 11 June 2013 adopted by the judgment creditor is also erroneous as the date should have been 7 June 2011 instead.

Judgment Creditor's Contentions

[35] On the other hand, Miss Tee strenuously argued that the sum demanded in the bankruptcy notice and creditor's petition is correct and proper in accordance with the judgment. The details were all clearly stated in the bankruptcy notice and creditor's petition which are sufficient following *Re: Dahlia Madon; Ex p: HSBC Bank Malaysia Bhd* [2012] 1 LNS 1180 and *Per: Datuk Dr Kamal Salih; Ex p: Affin Bank Berhad* [2008] 1 LNS 80. She stated that the judgment debtor knew of the variable interest rate at all material times since the commencement of the earlier bankruptcy proceedings commenced by the judgment creditor that was withdrawn. In particular, Miss Tee relied on the cases of *Affin Bank Berhad v. Tan Sri Kishu Thirathrai (No. 2)* [2004] 7 CLJ 145; [2004] MLJU 349, *Transbay Ventures Sdn Bhd v. Public Bank Bhd* [2007] 7 CLJ 386 and *Per: EON Bank Bhd; Ex p: Buang Hj Ahmad* [2008] 1 LNS 339 to submit that varying interest rates were normal and is consistent with the judgment obtained herein. As to s. 6(3) of the Limitation Act 1953, it is submitted by Miss Tee that the

interest on the judgment is only considered due from the date of judgment following the Federal Court cases of *United Malayan Banking Corporation Bhd v. Ernest Cheong Yong Yin (supra)*, *Moscow Narodny Bank Ltd v. Ngan Ching Wen* [2004] 2 CLJ 241 and *Perwira Affin Bank Bhd v. Lim Ah Hee* [2004] 2 CLJ 787. Accordingly, the judgment interest claimed by the judgment creditor is neither time barred nor excessive.

[36] Consequently, Miss Tee argued that the judgment debtor's argument that there was no act of bankruptcy committed by reason of the defective bankruptcy notice is misconceived. In respect of the date of the act of bankruptcy, she submitted that it is correct following r. 276 of the Bankruptcy Rules 1969 read with O. 3 r. 2(5) of the Rules of Court 2012.

Findings Of The Court

[37] I observed that the judgment debtor had originally in the r. 117 Notice challenged the authority of Thean Soon Hin to issue the creditor's petition on behalf of the judgment creditor. This argument was not pursued by Mr Loi in this appeal and is hence treated as abandoned.

[38] Be that as it may, it was submitted by Miss Tee that Thean Soon Hin is at all material times duly authorised under the common seal of the judgment creditor to issue the creditor's petition on its behalf pursuant to a power of attorney dated 12 May 2005. Clause 5 of the power of attorney provides: "To take proceedings in bankruptcy and winding up of companies and other processes against the estate or persons of insolvent debtors for any debt, demand or claim due to or claimed by the bank and to take all steps and do all things requisite for recovering and making good any such debt, demand or claim against any person or body politic or corporate company or firm."

[39] This clause is similar to that in *Tan Siew Peng v. MUI Finance Bhd* [1996] 1 BLJ 439 where Chin Fook Yen JC (as he then was) held after examining the clause in the power of attorney that there was clear evidence that the officer therein was authorised under the seal of the petitioner by the said power of attorney to commence bankruptcy proceedings.

[40] The critical issue as raised by the judgment debtor is whether the sum of RM4,602,675.24 claimed by the judgment creditor in the bankruptcy notice and creditor's petition is excessive for not being in accordance with the summary judgment. In this regard, s. 3 of the Bankruptcy Act 1967 provides:

> 3(1) A debtor commits an act of bankruptcy in each of the following cases:
>
> (a) to (h) ...
>
> (i) if a creditor has obtained a final judgment or final order against him for any amount and execution thereon not having been stayed has served on him in Malaysia, or by leave of court elsewhere, a bankruptcy notice under this Act requiring him to pay the judgment

A debt or sum to be paid in accordance with the terms of the judgment or order with interest quantified up to the date of the issue of the bankruptcy notice, or secure or compound for it to the satisfaction of the creditor or the court; and he does not within seven days after service of the notice in case service is effected in Malaysia, and in case service is effected elsewhere then within the B time limited in that behalf by the order giving leave to that effect the service, either comply with the requirements of the notice or satisfy the court that he has a counterclaim, set off or cross demand which equals or exceeds the amount of the judgment debt or sum ordered to be paid and he could not set up in the action in which the judgment was obtained or in the proceedings in which C the order was obtained:

Provided that for purposes of this paragraph and of section 5 any person who is for the time being entitled to enforce a final judgment or final order shall be deemed to be a creditor who has obtained a final judgment or final order;

D (j) ...

(2) A bankruptcy notice under this Act shall be in the prescribed form and shall state the consequences of non compliance therewith and shall be served in the prescribed manner:

E Provided that a bankruptcy notice:

(i) may specify an agent to act on behalf of the creditor in respect of any payment or thing required by the notice to be made to or done to the satisfaction of the creditor; and

(ii) shall not be invalidated by reason only that the sum specified in F the notice as the amount due exceeds the amount actually due unless the debtor within the time allowed for payment gives notice to the creditor that he disputes the validity of the permit on the ground of such mistake; but if the debtor does not give such notice he shall be deemed to have complied with the bankruptcy notice, if within the time allowed he take such steps as would have G constituted compliance with the notice had the actual amount due had been correctly specified therein.

[41] The judgment creditor has maintained that the sum as claimed is correct in accordance with the summary judgment obtained and contended that the judgment debtor has failed to challenge the sum stated in the H bankruptcy notice either by filing a form no 7 affidavit based on r. 95 of the Bankruptcy Rules 1969 or serving a notice pursuant to the proviso in s. 3(2)(ii) of the Bankruptcy Act 1967.

[42] Mr Loi has argued that the judgment debtor has in fact sent a short I letter to the judgment creditor's solicitors dated 6 June 2013 which reads "With reference to your bankruptcy notice dated 22 February 2013, kindly take note that I do not admit owing your client the sum stated therein. Your client claim is wrong and excessive." That letter is sufficient notice for purposes of the proviso in s. 3(2)(ii) of the Bankruptcy Act.

[43] However Miss Tee strenuously argued to the contrary in reliance on the Supreme Court case of *Datuk Lim Kheng Kim v. Malayan Banking Bhd* [1993] 4 BLJ 28; [1993] 2 MLJ 298 where it was held that merely disputing indebtedness to the sum without condescending to particulars of the amount actually due did not attract the proviso. Accordingly the judgment debtor's letter dated 6 June 2013 is not a valid notice and the judgment debtor must be precluded from challenging the alleged excessive sum claimed in the bankruptcy notice and creditor's petition. She further argued that it is too late for the judgment debtor to argue at the hearing of the creditor's petition that the amount claim is excessive without the proper and effective challenge at the stage after the issuance of the bankruptcy notice following the cases of *Re Khaw Siew Suan; Ex p Asia Commercial Finance (M) Bhd* [2000] 8 CLJ 516; [2001] 1 MLJ 101, *Lim Koon Chow v. Ambank (M) Bhd* [2012] 4 CLJ 624 and the Court of Appeal case of *Captain Ho Fooi v. Standard Chartered Bank Malaysia Bhd* [2009] 5 CLJ 501. In the court of appeal case, Sulaiman Daud JCA said at p. 510 and p. 514 that:

> From the content thereof (notice of intention to oppose petition), it is obvious that the debtor by way of such notice not only seeks to challenge the creditor's petition but also to set aside the bankruptcy notice. *As pointed out by this court in Dato' Sri Teong Teck Leng v. Jupiter Securities Sdn Bhd [2003] 4 CLJ 34, there are two stages in bankruptcy proceedings, namely the notice stage and the petition stage. The Rules also provide for different modes or procedures in opposing or challenging a bankruptcy notice and creditors petition ... It is trite law that any challenge to the validity of a bankruptcy notice on the ground that the amount stated therein exceeds the amount actually due must be made within the time prescribed in the said notice as required by the aforesaid proviso ...* (emphasis added)

[44] There are however conflicting Court of Appeal cases that are relied upon by Mr Loi. In *J Raju M Kerpaya v. Commerce International Merchant Bankers Bhd* [2000] 3 CLJ 104; [2000] 3 MLJ 177, Gopal Sri Ram JCA (as he then was) said at p. 118 (CLJ); p. 189 (MLJ) that:

> The appellant's complaint is not merely that the respondent in its bankruptcy notice mistakenly claimed more than what is actually due, eg, because there was part payment which the notice did not give credit as in *Re Arunachalam*. *The complaint here is that the bankruptcy notice is not in accordance with the judgment. It is a separate and distinct head of challenge under s. 3(1)(i). The decision in Low Mun expressly authorises such a challenge. It is a jurisdictional challenge. This is because it is a condition precedent to the exercise of bankruptcy jurisdiction that a bankruptcy notice shall require the debtor to pay the judgment debt in accordance with the terms of the judgment on which it is founded. It follows that what we have here is not a case of mistake at all. It therefore falls well outside the scope of proviso (ii) to s. 3(2).* (emphasis added)

This case has been recently followed by the Court of Appeal in *Tan Chwee Hock v. AmBank (M) Bhd* [2012] 8 CLJ 905; [2012] 4 MLJ 159. I have also observed that this case has not been considered in the case of *Captain Ho Fooi (supra)*.

[45] The nature of the complaint here by the judgment debtor is similar to that in the case of *J Raju M Kerpaya (supra)*. The excessive sum complained is in fact raised both in the r. 117 Notice to oppose the creditor's petition besides also as a ground in the summons in chambers to set aside the bankruptcy notice. In the circumstances, I find and hold that I am not precluded in this appeal from considering the excessive sum challenge at least whether the ROAO was correctly ordered.

[46] It follows that the next critical and pivotal issue is whether the sum claimed is in fact not in accordance with the summary judgment dated 14 April 2008.

[47] The main argument of Mr Loi is that the interest rate in the summary judgment here ought to be pegged or fixed at 9.5% and no longer varying by way of a merger. He drew the rationale from the Federal Court judgment of *United Malayan Banking Corporation Bhd v. Ernest Cheong Yong Yin* [2002] 2 CLJ 413; [2002] 2 MLJ 385 where Abdul Malek Ahmad FCJ said at pp. 414 & 427 (CLJ); p. 397 (MLJ):

> ... As for the prejudgement interest, despite the Court of Appeal's finding on this point, we hold that it is in order as it is merged with the principal amount from the date of the breach, and which is the standard stipulation in all contracts, to become the judgment sum. I am however unable to discern as to how this passage *per se* supports the Judgment Debtor. It is thus necessary to reproduce the contents of the high court judgment which is found in Abdul Malek Ahmad FCJ's *dicta* at p 389 as follows:
>
> > On 15 October 1987, the appellant had obtained summary judgment against the respondent for RM95,864.93 on the overdraft account together with interest at 15% pa thereon at monthly rests from 1 April 1986 until full realisation, and for RM66,051.74 on the overdue trust receipt account together with interest at 16% pa thereon until full settlement and RM350 costs ...

[48] From my reading of the judgment, I see that the interest rate therein is plainly stated as 15% per annum and 16% per annum for the overdraft account and trust receipt account respectively. I am nevertheless still unable to comprehend nor appreciate Mr Loi's argument as to how that case can be the authority for the proposition that the contractual varying base lending rate (which is applicable in this case) has been merged into the judgment as a fixed rate. There is nothing in the judgment which indicated that the contractual interest rate in those loans was even subject to varying base lending rate in the first place.

[49] The contrary position adopted by Miss Tee is clearer. She relied on the case of *Affin Bank Berhad v. Tan Sri Kishu Thirathrai (No. 2)* [2004] 7 CLJ 145; [2004] MLJU 349 where Abdul Malik Ishak J (as he the was) held at p. 163 (CLJ); p. 12 (MLJ) that:

> To say that summary judgment is a nullity as the BLR is not stated is to overlook the fact that the BLR cannot be fixed and it fluctuates on a regular basis. This court certainly can take judicial notice that BLR fluctuates from time to time. It is the banking practices of the country and everyone knows that.

[50] She went on to illustrate her point in two cases.

Firstly in *Transbay Ventures Sdn Bhd v. Public Bank Bhd* [2007] 7 CLJ 386, Abdul Wahab Said J held at p. 391-392 as follows:

> [14] For ease of reference, the judgment of 22 August 2003 is reproduced below:
>
> ADALAH PADA HARI INI DIHAKIMKAN bahawa Defendan hendaklah membayar kepada Plaintif seperti berikut:
>
> (a) jumlah terhutang sebanyak RM13,860,089.29 setakat 31.10.2002;
>
> (b) *faedah berterusan ke atas jumlah RM13,860,089.29 padar kadar 2.5% setahun ke atas Kadar Pinjaman Dasar Plaintif pada rehatan bulanan ("Kadar Prinsip") ("Kadar Pinjaman Dasar Plaintif setakat 31.10.2001 adalah 6.4% setahun")* dengan faedah tambahan pada kadar 1% setahun keatas Kadar Prinsip dari 1.11.2001 sehingga tarikh penyelesaian penuh.
>
> [15] *As to the calculation of interest, the order stated clearly that it is on the amount of RM13,860,089.29 as at 31 October 2001 and continuing at the rate of 2.5% per year above defendant's base lending rate on monthly rest (prescribed rate).* The Plaintiff's base lending rate @ 31 October 2001 is specified in the judgment at 6.4% per annum together with additional interest at the rate of 1% per annum over the prescribed rate from 1 November 2001 until date of full settlement.
>
> [16] *I am satisfied the judgment is certain on the calculation of interest. The margin has been specified at 2.5%. as for base lending rate which may fluctuate, this is easily ascertained and I take judicial notice that banks are required to post it at their premises and also notify public in the press ...* (emphasis added)

The second case is *Per: EON Bank Bhd; Ex p: Buang Hj Ahmad* [2008] 1 LNS 339 where the judgment reads:

> ... ADALAH PADA HARI INI DIHAKIMKAN bahawa Defendan Ketiga hendaklah membayar kepada Plaintif jumlah terhutang sebanyak RM3,578,662.37 setakat 5.2.2002 di bawah Kemudahan Overdraft ll *bersamaan dengan faedah berterusan ke atasnya pada kadar 2.5% setahun di atas Kadar Pinjaman Asas Plaintif dikira pada dasar rehatan harian dari 6.2.2002 sehingga tarikh penyelesaian penuh (Kadar Pinjaman Dasar Plaintif setakat 5.2.2002 adalah 6.4% setahun) dan kos tindakan ini sebanyak RM350.00*

and Kang Hwee Gee J (as he then was) held at pp. 9-10:

> *Having examined the contents of the judgment* I am in full agreement with the submission of counsel for the judgment creditor that *the judgment contained the judgment sum with a fixed interest of 2.5% per annum and a varying interest rate based on the current base lending rate. I am in full agreement with the decision of Abdul Wahab Said J in Transbay Ventures Sdn Bhd v. Public Bank Bhd supra, that the court is entitled to take judicial notice that banks in practice impose a fluctuating base lending rate. The bankruptcy notice clearly contains particulars of the various varying base lending rates up to the time the notice was filed*. The sum of RM5,055,504.15 as at 10.5.2006 claimed on the notice was arrived at by adding up the principal sum owed plus the amount incurred under each chargeable base lending rate and costs.
>
> *There is no irregularity in the bankruptcy notice*. (emphasis added)

[51] It is my view that it is a question of construction of the summary judgment dated 14 April 2008 as to whether the interest chargeable is fixed or varying. The judgment which is reproduced in para. 6 here is similar though not identical with the judgments in *Transbay Ventures Sdn Bhd v. Public Bank Bhd (supra)* and in *Per: EON Bank Bhd; Ex p: Buang Hj Ahmad (supra)*. I also take judicial notice here that commercial banks impose fluctuating base lending rates and the banking facilities afforded by the judgment creditor to the judgment debtor here is likewise on the same footing.

[52] On careful examination of the judgment, it is plain to me that the interest chargeable on the principal sum is fixed at 3.5% above the base lending rate that is fluctuating. The phrase in parenthesis which states that the base lending rate is 6% as at 23 August 2004 is for information only of the prevailing base lending rate at that point in time. I would not construe those as limiting words to lock the base lending rate at 6% per annum as apparently so suggested by the judgment debtor.

[53] The other contention of the judgment debtor on excessive amount claimed is that the judgment creditor has violated s. 6(3) of the Limitation Act 1953 because of interest claimed from 24 August 2004 to 22 February 2013 which is more than six years from the date on which the interest became due. Section 6(3) of the Limitation Act 1953 reads:

> (3) An action upon any judgment shall not be brought after the expiration of twelve years from the date on which the judgment became enforceable and no arrears of interest in respect of any judgment debt shall be recovered after expiration of six years from the date on which the interest became due.

[54] As submitted by Miss Tee for the judgment creditor, the law in this regard is settled in the string of Federal Court cases of *United Malayan Banking Corporation Bhd v. Ernest Cheong Yong Yin* [2002] 2 CLJ 413, *Moscow Narodny Bank Ltd v. Ngan Ching Wen* [2004] 2 CLJ 241 and *Perwira Affin Bank Bhd v. Lim Ah Hee* [2004] 2 CLJ 787. In the last case, Abdul Hamid Mohamad FCJ (as he then was) said at p. 804:

A few things need be said about this part of the judgment. First, the learned judge took the date from which the interest was calculated (1 December 1985) as the date the interest became due. *In view of the judgment of this court in Ernest Cheong which was followed by this court in Moskow Narodny Bank Ltd, with respect, that is not correct. Those cases held, and I agree, that regarding interest before judgment, the date the interest became due is the date of judgment. The interest merged with the judgment sum.*

Secondly, the learned judge calculated the period of limitation from the date the interest was calculated in the judgment (1 December 1985) to the date of judgment (23 October 1987). In view of the two judgments of this court just mentioned, with respect, that too is not correct. *As decided in Earnest Cheong, the period is to be calculated from the date of judgment to the date of filing of the bankruptcy notice* ... (emphasis added)

[55] I note that the judgment creditor is claiming in the bankruptcy notice and creditor's petition for interest on the banking facilities based on the terms of judgment debt, *to wit*:

(i) the period between 24 August 2004 to 14 April 2008 (date of the summary judgment) comprising of pre judgment interest; and

(ii) the period between 15 April 2008 to 22 February 2013 (date of filing of the bankruptcy notice) comprising of post judgment interest.

The pre judgment interest has been merged into the judgment debt as interpreted by the Federal Court. The period from the date of the summary judgment and the date of the filing of the bankruptcy notice is therefore well within the six years period as prescribed by the second limb of s. 6(3) of the Limitation Act 1953.

[56] The judgment debtor's contention on this point is hence misconceived.

[57] In the premises, I find and hold that the sum claimed by the judgment creditor with detail computation of the interest charged in the bankruptcy notice and the creditor's petition is in accordance with summary judgment and not excessive of all. Accordingly, I hold there is no irregularity in the bankruptcy notice and the creditor's petition.

[58] The final point of contention raised by the judgment debtor relates to the date of the act of bankruptcy committed by him. According to Mr Loi, it should have been 7 June 2013 and not 11 June 2013 as relied upon by the judgment creditor. By s. 3(1)(i) of the Bankruptcy Act 1967, the act of bankruptcy is deem committed after seven days of the service of the bankruptcy notice if the judgment debtor did not comply with the requirements of the notice.

[59] The bankruptcy notice here was served *via* substituted service on 31 May 2013. It is argued by Miss Tee that the aforesaid seven days period is subject to r. 276 of the Bankruptcy Rules 1969 read together with O. 3 r. 2(5) of the Rules of Court 2012 which provides:

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> Where, apart from this paragraph, the period is question, being a period of seven days or less, would include the day before the weekly holiday or public holiday, that day shall be excluded.

In this regard, she argued that there were two intervening weekends on 1 to 2 and 8 to 9 June 2013. The reckoning of time must therefore exclude these
B four days.

[60] I accept Miss Tee's argument and hold that the judgment debtor's act of bankruptcy herein occurred on 11 June 2013 as correctly stated by the judgment creditor. Therefore the judgment debtor's reliance on the Court of Appeal case of *Stephen Wong Leong Kiong v. HSBC Bank Malaysia Bhd*
C [2009] 6 CLJ 466; [2011] 4 MLJ 207 to find and justify a sufficient cause by reason of the erroneous date of the act of bankruptcy here to dismiss the creditor's petition is unsustainable.

Conclusion

D **[61]** By reason of my findings above, there is no merit in the judgment debtor's appeal. Accordingly, I dismiss the appeal with costs of RM6,000. The judgment creditor has also submitted that the costs should be borne by the judgment debtor's solicitors personally pursuant to O. 59 r. 6(1) of the Rules of Court 2012 but I have declined to make such a cost order because
E I do not find that they have conducted this appeal unprofessionally or without due propriety as explained in *Amat Loyut & Ors v. Ng Eng Kiat & Ors* [2014] 1 CLJ 901.

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